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Supreme Court, U.S.
FILED

01-369 AUG 27 2001

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 2000

STUART M. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

I. Whether the Fifth Circuit Panel erred affirming the Tax Court decision applying the presumption of correctness in an unreported income context, because the Commissioner failed to offer rational, substantial evidence supporting his determination that Smith received unearned income.

II. Whether the Fifth Circuit Panel erred affirming the Tax Court decision holding that Smith had not met his burden to prove the Commissioner's determination of unearned income was erroneous.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals denying Stuart M. Smith's Petition for Rehearing En Banc is not reported. The Order was filed May 30, 2001, and is styled *Stuart M. Smith, Jr. v. Commissioner of Internal Revenue*, Appeal No. 00-60537 (5th Circuit), and is reprinted in Appendix A.

The opinion of the Fifth Circuit Court of Appeals denying Stuart M. Smith's appeal is reported as *Stuart M. Smith, Jr. v. Commissioner of Internal Revenue*, 252 F.3d 1357; 2001 U.S. App. LEXIS 17248; 2001-1 U.S. Tax Cas. (CCH) P50,394; 87 A.F.T.R.2d (RIA) 2051 (Fifth Circuit, April 5, 2001), and is reprinted in Appendix B.

The opinion of the United States Tax Court is reported as *Stuart M. Smith, Jr. v. Commissioner of Internal Revenue*, T.C. Memo 2000-43; 2000 Tax Ct. Memo LEXIS 44; 79 T.C.M. (CCH) 1474 (Tax Court, February 9, 2000), and is reprinted in Appendix C.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals in this case, denying Stuart M. Smith's petition for rehearing en banc, was filed on May 30, 2001. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if mailed U.S.P.S. first class, postmarked by August 28, 2001.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On December 9, 1998, the Commissioner issued two notices of deficiencies to Smith cumulatively for the tax years 1992 through 1996. The Commissioner asserted an "absence of adequate records" concerning Smith's income and calculated Smith's 1993 through 1996 income by multiplying his 1992 income times the Consumer Price Index ("CPI") increase. The Commissioner used the CPI despite the fact that all of Smith's income was reported by Smith's employers for each year. The Commissioner decided that the difference between the CPI calculation and the reported income for each year was unreported income.

On February 17, 1999, Smith filed a petition for redetermination in the United States Tax Court. Smith stipulated to receiving the income reported to the IRS. On October 18, 1999, trial was held and evidence taken on the issue of whether the Commissioner had sufficient predicate evidence of unearned income to create a presumption of correctness in the use of the CPI. Both parties filed post-trial briefs.

On February 9, 2000, the Tax Court filed its memorandum opinion holding that the Commissioner had predicate evidence of unearned income for 1995 and 1996, but not for 1993 & 1994. On April 7, 2000, the Commissioner filed its computation of deficiency and additions to tax/penalties. On May 3, 2000, the Tax Court entered its Decision.

On July 24, 2000, Smith timely appealed to the United States Court of Appeals for the Fifth Circuit. On April 5, 2001, the panel affirmed the Tax Court in a *per curiam* opinion.

Smith timely filed a petition for rehearing with suggestion

for rehearing *en banc*. Smith's petition was denied on May 30, 2001.

This timely petition follows.

REASON FOR GRANTING THE WRIT

I. The Fifth Circuit Panel Erred Affirming The Tax Court Decision Applying The Presumption Of Correctness In An Unreported Income Context, Because The Commissioner Failed To Offer Rational, Substantial Evidence Supporting His Determination That Smith Received Unearned Income

The Fifth Circuit Panel affirmed the Tax Court's decision in a *per curiam* opinion. The Tax Court held that a pre-employment questionnaire filled out by Smith, listing employment at two named companies which had not reported income paid to Smith to the IRS, was sufficient predicate evidence of unearned income as to justify the presumption of correctness despite the fact that W-2s already reviewed by the IRS plainly showed that these companies had alr ady reported income paid to Smith under other company names. In other words, the lower courts allowed the IRS to tax the same income twice. It also held that Smith had failed to overcome the presumption.

The panel decision conflicts with the following decisions: *Janis v. United States*, 428 U.S. 433, 441 (1976) (assessment without a "rational foundation" is "naked" and not entitled to presumption, citing *Helvering v. Taylor*, 293 U.S. 507, 514-515 (1935)); *Yoon v. Commissioner*, 135 F.3d 1007, 1013-14 (5th Cir. 1998) ("the IRS may compute the taxpayer's income by any reasonable method that clearly reflects income; however, a tax

determination without rational foundation is 'not properly subject to the usual rule with respect to the burden of proof in tax cases.'"); *Parker v. Commissioner*, 117 F.3d 785, 786-87 (5th Cir. 1997) (*Portillo* requires IRS to "conduct an independent investigation" when W-2s conflict with taxpayer supplied information); *Sealy Power, Ltd. v. Commissioner*, 46 F.3d 382, 386 (5th Cir. 1995) (In an unreported income case, if the Commissioner "does not substantiate the notice's determination with some predicate evidence . . . the taxpayer should be relieved of the burden of going forward with the evidence."); *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991) (In a Tax Court deficiency proceeding, as here, if the assessment is arbitrary and erroneous, the burden is on the Commissioner "to prove the correct amount of any taxes owed.").

The proceeding also involves a question of exceptional importance because it addresses the level of proof the IRS must meet in unreported income cases to be entitled to the presumption of correctness. The Fifth Circuit Panel's decision conflicts with the following authoritative decisions of other United States Courts of Appeals: *De Cavalcante v. Commissioner*, 620 F.2d 23, 28 (3rd Cir. 1980) (presumption requires "a minimum factual basis"); *Rapp v. Commissioner*, 774 F.2d 932, 935 (9th Cir. 1985) ("presumption arises only where it is supported by some substantive evidence that taxpayer received unreported income"); *Weimerskirch v. Commissioner*, 596 F.2d 358, 360-61 (9th Cir. 1979) (presumption does not arise until United States offers "substantive evidence showing that the taxpayer received income"); *United States v. Nipper*, 2001 U.S. App. LEXIS 1813, *4-10, 2001-1 U.S. Tax Cas. (CCH) ¶50,229 (10th Cir. 2001) (clear error and abuse of discretion to grant judgment based on the presumption of correctness without substantive

evidence demonstrating that the taxpayer received unreported income); *United States v. McMullen*, 948 F.2d 1188, 1192 (10th Cir. 1991) ("A presumption of correctness attaches to the Commissioner's assessment, once some substantive evidence is introduced demonstrating that the taxpayer received unreported income."); *Erickson v. Commissioner*, 937 F.2d 1548, 1550-51 (10th Cir. 1991) (when the determination "lacks a rational basis the presumption evaporates" and "may not be supported even where the taxpayer is silent.").

All income earned by Smith during 1992 through 1996 was reported to the IRS. Prior to the issuance of the notices of deficiency, Smith's income had been reported to the Commissioner as follows:

Year	Payor	Type	Amount
1992	AMRE, Inc.	Wages	594
1992	Winterfold Sec., Inc.	Wages	$25,374
1993	Winterfold Sec., Inc.	Wages	12,272
1993	U.S. Treasury	Interest	3,441
1993	Texas Emp. Comm.	Unemployment Comp.	5,390
1994	Movies 4 Dale, Inc.	Wages	465
1994	BLL Corp.	Wages	112
1994	Adia Services, Inc.	Wages	3,865
1994	U.S. Treasury	Interest	376
1994	Texas Emp. Comm.	Unemployment Comp.	2,589
1995	Adia Services, Inc.	Wages	1,283
1995	Dobbs Temp. Services	Wages	2,344
1995	Great Spring Water of America	Wages	7,309
1996	Great Spring Water of America	Wages	3,451

1996 Jake's Temps III, Inc. Wages 2,078

Thus, Smith's reported income was $25,968, $21,103, $7,398, $10,936, and $5,529 for 1992 through 1996, respectively.

On July 24, 1996, Smith filled out a pre-employment questionnaire ("questionnaire") to get the job at Jakes's Temps III, Inc. On the questionnaire, Smith listed his last three jobs, "most recent first," as "Perrier Group of America," "Pro Staff," and "Adia."

Smith's work at Perrier Group of America was "nationwide sales, customer service, and data entry of spring water companies." He listed a salary of $400 a week from July 1995 to March 1996. The W-2s from Great Spring Water of America lists the same address as the questionnaire lists for Perrier Group of America.

Smith listed his salary at Pro Staff as $350 a week from April 1995 to July 1995. The W-2 from Dobbs Services listed the employer as "Dobbs Temporary Services, Inc., dba Pro-Staff Personnel Services."

Smith listed the time he worked at Adia as from February 1994 to March 1995.

The Commissioner stated in his notice of deficiency that the basis for using the CPI was "the absence of adequate records." The Commissioner stated in his trial brief that he used the CPI "because [Smith] failed to provide any information or records concerning his income." At trial, however, the Commissioner asserted that Smith's listing of Perrier and Pro Staff on the questionnaire constituted predicate evidence of unreported income.

Smith denied receiving any income in addition to that reported to the IRS, and a stipulation was made to those amounts. Smith testified that he did not have any jobs other than those reported to the IRS, and a stipulation was made to those jobs. Smith testified that Perrier and Great Water were the same company. Smith testified that Great Water's W-2 had the same address that he listed for Perrier. Smith testified that the income reported by Great Water "matched" what he listed for Perrier. Smith testified that Dobbs was Pro-Staff, and he introduced Dobbs' W-2 indicating it did business as Pro Staff.

The Tax Court held that the questionnaire constituted predicate evidence of unreported income for 1995 and 1996. The Fifth Circuit Panel affirmed that determination.

A. The Presumption of Correctness.

Because the challenged underpayment in this case involves "unreported income," special considerations apply. "A determination of deficiency issued by the Commissioner is generally given a presumption of correctness, which operates to place on the taxpayer the burden of producing evidence showing that the Commissioner's determination is incorrect." *Sealy Power*, 46 F.3d at 386. However, in this unreported income case, if the Commissioner "does not substantiate the notice's determination with some predicate evidence . . . the taxpayer should be relieved of the burden of going forward with the evidence." *Id.*[1] Indeed, in a Tax Court deficiency

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1. See also *Janis v. United States*, 428 U.S. 433, 441 (1976) (assessment without a "rational foundation" is "naked" and not entitled to presumption, citing *Helvering v.*

(continued...)

proceeding, as here, if the assessment is arbitrary and erroneous, the burden is on the Commissioner "to prove the correct amount of any taxes owed." *Portillo*, 932 F.2d at 1133. The Commissioner's burden is unaffected by a taxpayer's (1) refusal to meet with, or give information to, the IRS, (2) assertion of a Fifth Amendment claim rather than complying with an IRS summons, or (3) refusal to testify or produce witnesses in Tax Court. *Senter v. Commissioner*, T.C. Memo. 1995-311, 70 T.C.M. (CCH) 54 (1995) (applying Fifth Circuit law to these facts).[2] Because the IRS considered Smith's information to be

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1. (...continued)
Taylor, 293 U.S. 507, 514-515 (1935)); *United States v. McMullen*, 948 F.2d 1188, 1192 (10th Cir. 1991) ("A presumption of correctness attaches to the Commissioner's assessment, once some substantive evidence is introduced demonstrating that the taxpayer received unreported income."); *De Cavalcante v. Commissioner*, 620 F.2d 23, 28 (3rd Cir. 1980) (presumption requires "a minimum factual basis"); *Erickson v. Commissioner*, 937 F.2d 1548, 1551 (10th Cir. 1991) (when the determination "lacks a rational basis the presumption evaporates."); *Rapp v. Commissioner*, 774 F.2d 932, 935 (9th Cir. 1985) ("presumption arises only where it is supported by some substantive evidence that taxpayer received unreported income").

2. See also *Erickson*, 937 F.2d at 1551 (presumption of correctness for an assessment without reasonable foundation "may not be supported even where the taxpayer is silent"); *Weimerskirch*, 596 F.2d at 360-61 (presumption does not arise until United States offers "substantive evidence showing that the taxpayer received income from the charged activity).

inconsistent with the W-2s supplied by third parties, the IRS "must conduct an independent investigation" before being entitled to the presumption of correctness. *Parker*, 117 F.3d at 786-87.

Therefore, before Smith had any burden to present evidence, the Commissioner was required to present substantive evidence that Smith received unreported income. The Tax Court concurred with Smith's reading of the law:

> The Court of Appeals for the Fifth Circuit, where an appeal would lie, has recognized, however, that "a court need not give effect to the presumption of correctness in a case involving unreported income if the Commissioner cannot present some predicate evidence supporting its determination." If the presumption of correctness does not apply, [the Commissioner's] determination will be deemed arbitrary, and he will bear the burden of proving it correct. Thus, [the Commissioner] must establish that he had predicate evidence for his determinations that [Smith] received self-employment income relating to 1993 through 1996.

Yet, the Tax Court held, without explanation, that the questionnaire constituted predicate evidence justifying the presumption of correctness for 1995 and 1996, and that Smith then failed to present sufficient evidence that the determinations were erroneous. The Tax Court's entire factual analysis stated:

> [The Commissioner] has established that he had predicate evidence (i.e., the questionnaire) for his determinations that [Smith] received self-employment income in 1995 and 1996. The presumption of correctness is applicable, and [Smith] failed to present

> sufficient evidence establishing that these determinations are erroneous. Accordingly, we sustain [the Commissioner's] determination relating to [Smith's] income and self-employment tax deficiencies relating to 1995 and 1996.

The Tax Court's findings were clearly erroneous in both respects.

B. No Predicate Evidence.

"Predicate" evidence is not "any" evidence. As noted above, the Supreme Court requires a "rational foundation" for the determination. As also noted, federal appellate courts have described the level of evidence necessary to raise a presumption of correctness in unreported income cases as "substantive" or "rational." "By its very definition and etymology the word 'determination' irresistibly connotes consideration, resolution, conclusion, and judgment." *Portillo*, 932 F.2d at 1132. As the Fifth Circuit itself has held:

> Where the burden lies on the government to produce some factual predicate for an assessment, the government may not discharge that burden simply by imposing a naked assessment and then pointing out that the taxpayers did not produce evidence to rebut that assessment. Taxpayers do bear the burden of maintaining accounting records which enable them to file a correct tax return, and in the absence of such records the IRS may compute the taxpayer's income by any **reasonable** method that **clearly** reflects income; however, a tax determination without **rational** foundation is "not properly subject to the usual rule with respect to the burden of proof in tax cases."

Yoon, 135 F.3d at 1013-14 (citations omitted).

Turning to the evidence, it was reported to the Commissioner that Smith's three employers, prior to Jake's, was Great Spring Water of America, Dobbs Temp. Services, and Adia. The questionnaire states that the three prior employers were Perrier Group of America, Pro Staff, and Adia. The questionnaire and the W-2, on their face, present directly contradicting statements as to who Smith's last two employers were. Thus, the IRS was required to investigate. This investigation involved no burden at all on the IRS, because all they had to do was rationally consider the evidence they had already reviewed (the questionnaire and the W-2s). Instead, in a seemingly *post hoc* rationalization contradicting the theory asserted in the Notice of Deficiency, the Commissioner argued at trial that the questionnaire was evidence that Smith had unreported income from Perrier and Pro Staff. This conclusion was not substantive, rational, reasonable, or considered.

(1) Great Spring and Perrier.

It was unreasonable to conclude that Perrier was not Great Spring. First, Smith had historically worked as a W-2 employee, and the questionnaire lists the time employed at the three jobs as consecutively consuming all twelve months of 1995 and part of 1996. Thus, the rational first conclusion would be that the listed employers were the same three for which W-2's were received in 1995.

Second, no prior evidence exists of any unreported income. Indeed, just by looking at the reported income for 1992 through 1996, the obvious conclusion would be that Smith lost a good job at Winterfold in 1993, went on unemployment, and had struggled to make a living thereafter.

Third, Perrier is a well known "spring water" company, and Great Spring Water of America is presumptively a spring water company also. Both company names included "of America," circumstantially indicating that they both were U.S. subsidiaries of an international parent company. The questionnaire specified Smith's job functions as relating to "spring water companies."

Fourth, the amount of income reported for Great Spring in 1995 was approximately twice that in 1996 and the amount of time worked at Perrier in 1995 was approximately twice that in 1996. The wages reported in both 1995 and 1996 for Great Water was approximately that listed for Perrier, within the accuracy to be expected of the date and income information on the questionnaire.

Finally, the business address listed by Great Water on its W-2's was the same as the questionnaire showed for Perrier. It goes without saying that since the IRS had already reviewed Great Water's W-2s for Smith and Smith's questionnaire to come to the alleged conclusion that Smith had unearned income, the Commissioner knew, or should have known, the addresses were the same.

While the bare fact is true that the name "Great Water" is not "Perrier," this fact cannot form a rational basis for a determination that Smith had unearned income in light of the above facts known by the Commissioner.

(2) Dobbs and Pro Staff.

In addition to the first two reasons listed above as to Great Water and Perrier, it was also unreasonable to conclude that Pro Staff was not Dobbs. First, the wages reported in 1995 for

Dobbs was approximately that listed for Pro Staff, within the accuracy to be expected of the date and income information on the questionnaire. Second, the employer's name listed by Dobbs on the W-2s it sent to the IRS was "Dobbs Temporary Services, Inc., dba Pro-Staff Personnel Services."

Again, these facts do not justify the Commissioner's conclusion that Smith had unreported unearned income.

The IRS could have met the investigation required by simply observing the address of Great Water on the questionnaire, the address of Perrier on its W-2, and the name of Dobb's on its W-2, all of which allegedly having been reviewed prior to the issuance of the Notice of Deficiency. The only rational conclusion from such an investigation is that the questionnaire refers to jobs for which income has already been reported to the IRS. Thus, there is absolutely no rational proof of unearned income. The Tax Court clearly erred in finding that the Commissioner had sufficient predicate evidence to give its irrational and erroneous conclusion that Smith had unearned income the presumption of correctness. There was never any rational foundation for such a "determination." Without the presumption, the Commissioner had the burden to prove the amount of unearned income. For the same reason that the Tax Court held the Commissioner failed to meet his burden of proof as to 1993 and 1994,[3] he did not do so for 1995 or 1996 either.

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3. A failure to present any evidence.

II. The Fifth Circuit Panel Erred Affirming The Tax Court Decision Holding That Smith Had Not Met His Burden To Prove The Commissioner's Determination Of Unearned Income Was Erroneous.

A. The Determination Was Erroneous.

Even assuming the presumption of correctness was established, Smith would then bear the burden of proving by a preponderance of the evidence that the determination was arbitrary or erroneous. *Yoon*, 135 F.3d at 1012. For all the above reasons, the "determination" that Smith had unearned income was erroneous by a preponderance of the evidence in the possession of the Commissioner when he issued the notice of deficiency.

Smith testified at trial, and he denied receiving any income in addition to that reported to the IRS, which he agreed to in the stipulations. Smith testified that he did not have any jobs other than those reported to the IRS and so stipulated. Smith testified that Perrier and Great Water were the same company, and that Great Water's W-2 had the same address that he listed for Perrier. Smith testified that the income reported by Great Water "matched" what he listed for Perrier, that Dobbs was Pro-Staff, and introduced Dobbs' W-2 indicating it did business as Pro Staff. All of his testimony was uncontroverted.

While as "a practical matter it is never easy to prove a negative," *Portillo*, 932 F.2d at 1133 n.2, on this record the Commissioner's "determination" of unearned income was erroneous beyond a reasonable doubt. The Fifth Circuit Panel's affirmance of the Tax Court's contrary conclusion renders nugatory Fifth Circuit precedents, is contrary to this Court's precedents, and in conflict with all other federal appellate court

precedents on this issue.

The record makes it clear that the Commissioner had no actual proof whatsoever that Smith had unearned income. To allow the Tax Court decision to stand negates the well-established rule that the IRS must come forward with some rational, substantial foundation establishing the receipt of unearned income prior to being given the presumption of correctness. Here, the Fifth Circuit Panel has allowed the presumption upon proof of nothing more than two companies using different business names and, at best, a complete failure of the IRS to observe the facts in its possession.

Proof of the value of maintaining the unearned income exception to the presumption lies in the fact that Smith was incarcerated for over three months in 1996 while the IRS said, to the satisfaction of the Tax Court and a Fifth Circuit Panel, he was earning income.

Because the Fifth Circuit Court of Appeals failed to properly apply long and well settled precedent, ignored Supreme Court precedent, and all other federal appellate court precedents of other circuits, a writ of *certiorari* should issue to correct the judgment.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,

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Dallas, TX 75240-3817
Telephone: (972) 238-1328

August 24, 2001.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60537

STUART M. SMITH, JR.,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the Decision of the
United States Tax Court

May 30, 2001, Filed

ON PETITION FOR REHEARING EN BANC

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[Signed]
UNITED STATES CIRCUIT JUDGE

APPENDIX B

STUART M. SMITH, JR., Petitioner-Appellant, versus COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 00-60537

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

252 F.3d 1357; 2001 U.S. App. LEXIS 17248; 2001-1 U.S. Tax Cas. (CCH) P50,394; 87 A.F.T.R.2d (RIA) 2051

April 5, 2001, Filed

NOTICE:

DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:

Appeal from the Decision of the United States Tax Court.

JUDGES:

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

OPINION: PER CURIAM:[1]

We affirm for essentially the reasons stated by the Tax Court.

AFFIRMED.

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1. Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX C

STUART M. SMITH, JR., Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 3183-99

UNITED STATES TAX COURT

T.C. Memo 2000-43; 2000 Tax Ct. Memo LEXIS 44; 79 T.C.M. (CCH) 1474

February 9, 2000, Filed

DISPOSITION:
Decision will be entered under Rule 155.

COUNSEL:
Stuart M. Smith, Jr., pro se.

Alvin A. Ohm, for respondent.

JUDGES:
Foley, Maurice B.

OPINIONBY:
FOLEY

OPINION:

MEMORANDUM FINDINGS OF FACT AND OPINION

FOLEY, JUDGE: By notices dated December 9, 1998, respondent determined the following deficiencies and additions to tax relating to petitioner's Federal income taxes:

Year	Deficiency	Sec. 6651(a)	Sec. 6654
1992	$ 3,011	$ 742	$ 129
1993	3,807	952	159
1994	5,783	1,446	298
1995	5,496	1,359	296
1996	5,817	1,453	309

All section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

After concessions, the remaining issues for decision are whether petitioner is liable for: (1) Income and self-employment taxes relating to reconstructed self-employment income and (2) additions to tax.

FINDINGS OF FACT

Petitioner resided in Dallas, Texas, at the time his petition was filed. During the years in issue, petitioner worked in both permanent and temporary positions for various businesses. Petitioner received $ 25,968, $ 21,103, $ 7,398, $ 10,936, and $ 5,529 of wages, interest income, and unemployment compensation relating to 1992, 1993, 1994, 1995, and 1996, respectively. Petitioner did not file tax returns for any of the years in issue.

On July 24, 1996, petitioner submitted a Pre-Employment Questionnaire (questionnaire) to Jakes' Temps. On the questionnaire, petitioner listed several previous employers. Petitioner stated that he worked for Pro Staff during 1995 and for Perrier Group of America during 1995 and 1996. At the time he made his determinations, respondent had no record (i.e.,

no Forms W-2 or 1099) of petitioner's working for either of these businesses.

Petitioner failed to provide respondent with any information relating to his income. Respondent, using 1992 as the base year, reconstructed petitioner's gross income relating to 1993 through 1996 by applying the Consumer Price Index (CPI) method to 1993 through 1996 and subtracting income reported on Forms W-2 and 1099. On December 9, 1998, respondent mailed petitioner notices of deficiency in which respondent determined that petitioner: (1) Received self-employment income of $ 5,524, $ 19,986, $ 17,165, and $ 23,329 relating to 1993, 1994, 1995, and 1996, respectively; and (2) was liable for income tax and, pursuant to section 1401, self- employment tax.

OPINION

I. RECONSTRUCTED SELF-EMPLOYMENT INCOME

Generally, a notice of deficiency is presumed correct, and the taxpayer bears the burden of proving that the determination is erroneous. See *Welch v. Helvering, 290 U.S. 111, 115, 78 L. Ed. 212, 54 S. Ct. 8 (1933).* The Court of Appeals for the Fifth Circuit, where an appeal would lie, has recognized, however, that "a court need not give effect to the presumption of correctness in a case involving unreported income if the Commissioner cannot present some predicate evidence supporting its determination." *Portillo v. Commissioner, 932 F.2d 1128, 1133* (5th Cir.), affg. in part and revg. and remanding in part *T.C. Memo 1990-68.* If the presumption of correctness does not apply, respondent's determination will be deemed arbitrary, and he will bear the burden of proving it correct. See *Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 386 (5th Cir. 1995),* affg. in part and revg. and remanding in

part *T.C. Memo 1992-168.* Thus, respondent must establish that he had predicate evidence for his determinations that petitioner received self-employment income relating to 1993 through 1996.[1]

Respondent has established that he had predicate evidence (i.e., the questionnaire) for his determinations that petitioner received self-employment income in 1995 and 1996. The presumption of correctness is applicable, and petitioner failed to present sufficient evidence establishing that these determinations are erroneous. Accordingly, we sustain respondent's determinations relating to petitioner's income and self-employment tax deficiencies relating to 1995 and 1996.

Respondent failed, however, to establish that he had predicate evidence for his determinations that petitioner received self-employment income in 1993 and 1994. See, e.g., *Senter v. Commissioner, T.C. Memo 1995-311* (concluding that respondent failed to provide predicate evidence to support her deficiency determinations based on CPI calculations). Therefore, respondent has the burden of coming forward with evidence to establish the existence and amount of any deficiency. See *Jackson v. Commissioner, 73 T.C. 394, 401 (1979).* Respondent failed to present any evidence relating to

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1. Respondent, citing *Parker v. Commissioner, 117 F.3d 785 (5th Cir. 1997),* contends that he does not have to establish predicate evidence for these determinations. We disagree. The holding in *Parker* applies only to Commissioner's determinations relating to income reported by third-party payors. See *id. at 787* (holding that respondent has no duty to investigate third-party payment reports that are not disputed by the taxpayer).

these determinations. Accordingly, we do not sustain respondent's determinations relating to petitioner's income and self-employment tax deficiencies relating to 1993 and 1994.

II. ADDITIONS TO TAX

Respondent determined that petitioner is liable, pursuant to sections 6651(a) and 6654, for additions to tax for failure to file timely Federal income tax returns and to make estimated tax payments, respectively, relating to the years in issue. Petitioner failed to present any evidence relating to these issues. Accordingly, we sustain respondent's determinations.

Contentions we have not addressed are irrelevant or meritless.

To reflect the foregoing,

Decision will be entered under Rule 155.